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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-35526

CANADIAN CATTLEMEN'S ASSOCIATION and
ALBERTA BEEF PRODUCERS,

Appellants-Proposed Intervenors,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE et al.,

Defendants-Appellees,

v.

RANCHERS CATTLEMEN ACTION LEGAL FUND
UNITED STOCKGROWERS OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR DEFENDANTS-APPELLEES

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 611. This Court has jurisdiction under 28 U.S.C. § 1291 over the denial of appellants' motion to intervene. See, e.g., United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) (intervention of right); United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002) (permissive intervention). On May 17, 2005, the district court denied appellants' motion to

intervene. Excerpts of Record (ER) 93-99. On June 2, 2005, appellants filed a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(B). ER 101-102.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying appellants' motion to intervene as of right.

2. Whether the district court abused its discretion in denying appellants' motion for permissive intervention.

STATEMENT OF THE CASE

Appellants Canadian Cattlemen's Association (CCA) and Alberta Beef Producers (ABP) filed a joint motion to intervene in litigation in which a private party challenged the validity of a final rule issued by the United States Department of Agriculture. The district court denied appellants' motion to intervene as of right or for permissive intervention. This appeal follows.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

The Animal Health Protection Act, 7 U.S.C. § 8301 et seq., authorizes the United States Department of Agriculture (USDA) to prohibit or restrict the importation of animals or animal products "to prevent the introduction into or dissemination within the United States of any pest or disease of livestock." 7 U.S.C. § 8303(a)(1). The USDA, through its Animal and Plant Health Inspection Service (APHIS), has issued importation rules

concerning bovine spongiform encephalopathy (BSE), more commonly known as "mad cow disease." The agency has prohibited the importation of certain animals and related products from two types of regions: since 1989, it has prohibited such importation from regions where BSE is known to exist; and since 1997, it has prohibited such importation from regions presenting an undue risk of BSE. See 70 Fed. Reg. 460, 462 (Jan. 4, 2005) (describing prior rules).

Following the detection of a BSE-infected cow in Canada in May 2003, APHIS for the first time added Canada to the list of countries affected with BSE, effectively prohibiting imports of Canadian cattle and most Canadian beef. See 68 Fed. Reg. 31,939, 31,940 (May 29, 2003).

In November 2003, after conducting a comprehensive risk analysis, APHIS proposed the rule that underlies the present litigation. The proposed rule addressed the importation of cattle and certain related products from regions that pose a minimal risk of introducing BSE to the United States. See 68 Fed. Reg. 62,386 (Nov. 4, 2003). Among other things, the proposed rule would permit the importation of cattle less than 30 months old and certain beef products from Canada, which was found to be a minimal-risk region. See 68 Fed. Reg. at 62,398. After a notice-and-comment period, the proposed rule was finalized on

January 4, 2005, and was scheduled to go into effect on March 7, 2005. See 70 Fed. Reg. 460.

II. Facts And Proceedings Below

1. On January 10, 2005, plaintiff-appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) filed a complaint in the United States District Court for the District of Montana, naming as defendants USDA, APHIS, and the Secretary of Agriculture.[1] ER 20-54. The complaint seeks declaratory and injunctive relief to prohibit the government from enforcing the new rule permitting the importation from Canada of cattle less than 30 months old and related products.

On February 1, 2005, R-CALF moved for a preliminary injunction. On the same day, the National Meat Association (NMA) - which is not a party to the instant appeal - moved to intervene, arguing that it was entitled to both intervention as of right under Federal Rule of Civil Procedure 24(a) and permissive intervention under Rule 24(b). The district court denied NMA's motion on February 25, 2005, see ER 66-71, and on March 3, 2005, the district court entered an order granting R-CALF's motion for a preliminary injunction preventing the

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[1] The complaint originally named Ann M. Veneman in her capacity as the Secretary of Agriculture. Pursuant to Federal Rule of Civil Procedure 25(d)(1), current Secretary of Agriculture Mike Johanns was automatically substituted for former Secretary Veneman. See also Fed. R. App. P. 43(c)(2).

Department of Agriculture from implementing its rule, Supplemental Excerpts of Record (SER) 29-30.

On March 17, 2005, the USDA filed a notice of appeal from the district court's entry of a preliminary injunction. Eight days earlier, NMA had also filed its own notice of appeal from both the preliminary injunction and the denial of its intervention motion. This Court docketed the USDA's appeal as No. 05-35264 and NMA's appeal as No. 05-35214. This Court subsequently ordered both appeals to be heard by the same merits panel, with an oral argument scheduled for July 13, 2005.

2. While the appeals of the preliminary injunction were pending, the USDA and R-CALF filed cross-motions for summary judgment in the district court. A hearing on those motions is scheduled for July 27, 2005.

On March 18, 2005, appellants-proposed intervenors CCA and ABP (collectively, "appellants") moved to intervene in the district court, arguing that they are entitled to intervention as of right or permissive intervention. The district court denied that motion on May 17, 2005, see ER 93-99, although it subsequently granted appellants' motions for leave to file briefs as amicus curiae, see ER 110-113.

On June 2, 2005, appellants filed a notice of appeal from the district court's denial of their intervention motion. Appellants subsequently moved for an expedited briefing and

argument schedule. On June 15, 2005, this Court granted that motion, consolidated the instant appeal with the USDA's appeal and NMA's appeal, and ordered that all three appeals should be argued together on July 13, 2005. ER 114-115.

SUMMARY OF ARGUMENT

I. The district court correctly denied appellants' motion for intervention of right under Rule 24(a). Intervention of right is improper where the existing parties adequately represent the interests of the putative intervenor. Courts presume an adequacy of representation where the defendant and the would-be intervenor have the same "ultimate objective," and where their interests are "identical," the presumption is even stronger. The presumption is stronger still - requiring a "very compelling showing to the contrary" - where the putative intervenor intends to support the government acting on behalf of its constituency.

Appellants cannot overcome that strong presumption in this litigation. Here, the government and appellants share precisely the same interest in upholding the validity of the USDA's new rule and in opposing the preliminary injunction sought by and granted to R-CALF. The government undoubtedly will make - and already has made - all the arguments supporting the USDA's rule that appellants would make. And because this is an APA case, where judicial review is based solely on the record before the agency, appellants have no unique evidence or perspective to

offer that might warrant intervention. Although appellants' interest in the litigation is not sufficient to support intervention, they have been permitted to participate as a amici curiae in support of the government's appeal, and in the district court proceedings as well.

II. The district court did not abuse its discretion in denying permissive intervention under Rule 24(b). Appellants' interests are already more than adequately represented by the government, and they can add no new evidence or perspective to this APA case. Moreover, permitting intervention would unnecessarily complicate the litigation. If appellants were permitted to intervene, it is likely that the National Meat Association would also be permitted to do so. The numerous amici already participating in this litigation would likely follow suit. The proliferation of briefing and motions resulting from such intervention would threaten the orderly and timely resolution of this case.

STANDARD OF REVIEW

The district court's denial of intervention of right is reviewed de novo, Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998), and its denial of permissive intervention is reviewed

disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties." Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003). The putative intervenor bears the burden of demonstrating that he or she has satisfied each of these requirements. United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004). The district court properly denied appellants' motion for intervention as of right because their interests are already adequately represented by the Government.

A. Appellants' Interests Are Adequately Represented.

To determine whether existing parties will adequately represent the putative intervenor's interest, this Court considers three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." Arakaki, 324 F.3d at 1086. When a would-be intervenor and an existing party "have the same ultimate objective, a presumption of adequacy of representation arises," and where their interests are "identical," "a compelling showing should be required to demonstrate inadequate representation." Ibid.

Moreover, a proposed intervenor must satisfy an even higher threshold before it can intervene in support of the government where, as here, the existing party is "the government . . . acting on behalf of a constituency that it represents." Arakaki, 324 F.3d at 1086. As this Court has explained, "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that [the government] adequately represents its citizens when the applicant shares the same interest." Ibid. (citation omitted).

Appellants have not overcome the presumption against intervention. Appellants' stated purpose for intervening is to defend the USDA's rule permitting the importation of certain cattle and beef products from Canada. That, of course, is precisely the goal of the government in this litigation. In the district court, the government sought dismissal of R-CALF's complaint and opposed its motion for a preliminary injunction. Likewise, the government filed a cross-motion for summary judgment seeking judgment in its favor that would uphold the validity of the final rule in its entirety. Appellants' goal is precisely the same; their interest is therefore not only aligned with that of the government, it is identical to it. Accordingly, "a compelling showing should be required to demonstrate inadequate representation." Arakaki, 324 F.3d at 1086.

In the government's appeal to this Court defending the validity of the USDA's new rule and seeking to vacate the preliminary injunction, it has already made "all of [appellants'] arguments" in defense of the rule, and has already demonstrated that it is "capable and willing to make such arguments." Arakaki, 324 F.3d at 1086. The same is true in its opposition to the motion for a preliminary injunction and in its cross-motion for summary judgment in the district court. In both its brief to this Court and in its memoranda of law to the district court, USDA has vigorously defended the validity of its final rule and explained in detail why the district court erred in its contrary assessment. Indeed, it has explained and defended both the strong mitigation measures against BSE undertaken by Canada, as well as the high record of compliance with those measures by Canadian beef producers such as appellants here. Appellants have provided no persuasive reason to believe their interests are not adequately represented, and their brief offers little more than conclusory assertions of inadequate representation. See Br. at 23 (asserting, without explanation, that "[i]t is particularly implausible" that USDA would adequately represent them); id. at 30 (contending, without explanation, that interests are not congruent).[4]

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[4] Appellants argue that USDA "[n]either could nor would" protect its interests, because "USDA is not authorized to (continued...)

Moreover, appellants' participation as intervenor would not "offer any necessary elements to the proceeding that [the government] would neglect." Arakaki, 324 F.3d at 1086. Because the underlying litigation was brought under the Administrative Procedure Act, judicial review of USDA's decision should be limited to the record before the agency. See, e.g., Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). Consequently, appellants have no evidence or other information that is a "necessary element" to the issues before the district court or this Court. For these reasons, appellants' interests are more than adequately represented by the government, and intervention is therefore unwarranted.

B. Appellants' Arguments Are Unpersuasive

1. Foreign Persons are Subject to Same Intervention Standard

Appellants argue that because they are Canadians, i.e., "foreign persons," it would be "implausible" to believe USDA would represent their interests, because they are not

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[4](...continued)
represent the interests of foreign associations." Br. at 25. This argument fundamentally misapprehends the relevant inquiry. The question is not whether the United States has litigation authority to act as counsel for appellants or any other private party. Rather, the question is whether the United States will, through its participation in this litigation on its own behalf, also adequately represent the interest of others for whom it does not act as counsel.

"constituents" of the U.S. government. See Br. at 23. Appellants are indeed citizens of another country. They are incorrect, however, in believing that citizens of other nations may intervene as of right to defend regulations of the United States government that are vigorously defended by the United States itself.

Appellants' reliance (Br. at 23) on Fund for Animals, Inc. v. Norton, 322 F.3d 728 (D.C. Cir. 2003), is misplaced. That case involved intervention not by private parties but by a foreign sovereign. After granting intervention for two domestic private parties, the district court, without explanation, denied the foreign sovereign's request. This Court found no basis for deferring to a ruling of this kind, id. at 732, observing also that in that case the interests of the United States and the foreign sovereign might not be congruent.[5] That is plainly not the case here, as the briefs of the United States and of amicus curiae the government of Canada make plain. Contrary to appellants' suggestion, private citizens of a foreign nation have

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[5] The Court in Fund for Animals found that it was "not hard to imagine" where the interests of the Department of the Interior might diverge from the interests of the foreign sovereign, where Interior would be asked for an "assessment of the quality of [the foreign sovereign's] conservation program." 322 F.3d at 736. No similar situation is present here: USDA is already on record in this litigation as a firm defender of the BSE mitigation measures undertaken by Canada and Canadian cattle producers.

no greater intervention rights than private citizens of the United States.

Appellants also erroneously rely (Br. at 23) on United States v. City of Los Angeles, 288 F.3d 391, 401-02 (9th Cir. 2002). That case recognizes that it may be proper, in assessing the adequacy of representation provided by the United States, to consider whether the United States is advocating governmental interests as distinct from its interests as an employer. Id. at 402. That decision has no apparent relevance here, where the government is plainly acting in its sovereign capacity and asserts interests identical to those of the appellants.

2. Appellants Do Not Have a "Narrower" Interest than the Government.

Appellants fail to establish that their interests in this case are separate and distinct from that of the United States. This Court's decision in Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489 (9th Cir. 1995), on which appellants rely (Br. at 24), provides no support for their position. In that case, environmental groups sought injunctive relief, challenging the Forest Service's guidelines for the management of certain national forest lands because they allegedly failed to comply with the procedural requirements of the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). Id. at 1491. This Court permitted intervention by the State of Arizona and Apache County because

their interests diverged from those of the Forest Service in two important respects. Id. at 1499.

First, the injunction sought by the environmental groups would apply to "all of Arizona's 11.8 million acres of national forest lands and on nonfederal lands," id. at 1495 n.7 (emphasis in original), and "[t]he Forest Service is not charged with a duty to represent" the interests of the State and county concerning the nonfederal lands, see id. at 1499.[6] Given that the State and county sought to avoid an injunction applicable to land over which the Forest Service had no duty, the interests of the intervenors and the Forest Service obviously did not coincide.

Second, although the State, county, and the Forest Service shared a general interest in whether an injunction issued, the Forest Service also had a "broader" interest in "the procedural requirements of NEPA and NFMA with which the Forest Service must comply." Id. at 1499. That interest was not shared by "the more narrow . . . interests" of the State and county, whose principal interest concerned the impact of the injunction on their own nonfederal lands. Ibid. Injunctions are a discretionary remedy and do not automatically issue in response to a statutory

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[6] See also id. at 1491-92 (requested injunction would apply not only to Forest Service, but to its "contractors"); id. at 1495 ("the State and County have asserted . . . contracts with the federal government" that would be affected by the injunction).

violation. See id. at 1496. Accordingly, the State and county were free to argue that if an injunction were to issue, its scope should be limited to federal lands. See ibid. (intervenors "should be allowed to present evidence . . . to assist the court in fashioning the appropriate scope of whatever injunctive relief is granted"). That argument, of course, would not and could not be advanced by the Forest Service. Accordingly, the State and county had divergent interests from the Forest Service with respect to the scope of an injunction that might issue. And that is precisely why this Court permitted intervention only with respect to injunctive relief and denied intervention with respect to the issue of whether NEPA and NFMA were violated in the first place. Id. at 1496, 1499 & n.11; see also id. at 1497 n.9 (noting that if the requested injunction were "more limited in scope," that "may affect the district court's assessment of the [intervenor's] interest in the litigation").

In contrast, appellants do not suggest that they are seeking a result different than that advocated by the United States. The appellants' economic interests in this case are entirely dependent upon the validity of the agency's rule.[7]

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[7] Appellants cannot (and have not attempted to) intervene as of right to defend USDA's rule against the merits of R-CALF's NEPA claim, because "private intervenors in [a] NEPA action may not intervene as of right pursuant to Rule 24(a)." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108 (9th Cir. 2002). See also Wetlands Action Network v. U.S. Army Corps of Eng'rs, (continued...)

Appellants' reliance (Br. at 24-25) on Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810 (9th Cir. 2001), is also misplaced. In that case, the City of San Diego (the existing party) conceded that it would not adequately represent the proposed intervenors (local land developers). Id. at 823. And the Court noted that whether the City's interest was aligned with that of the developers was difficult to determine because the "ultimate objective" of the litigation was shrouded behind the "complexity" of the various inter-jurisdictional agreements, local management plans, and federal and state statutes at play. Ibid.; see also id. at 814-16 (describing the statutes, plans, and agreements at issue). Moreover, the City's interests in defending its local land management plan diverged from the developers' interests. The City's plan was based on five years of negotiation with local developers as well as numerous other stakeholders, see id. at 815, and therefore the City's defense of the plan necessarily reflected a "range of considerations" broader than those of the developers, id. at 823.

Nothing in Southwest Center remotely furthers appellants' argument for intervention. No one has conceded that appellants will be inadequately represented; no complexity obscures the fact that the Government and appellants share the same ultimate and

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[7](...continued)
222 F.3d 1105, 1114 (9th Cir. 2000); Sierra Club v. EPA, 995 F.2d 1478, 1485 (9th Cir. 1993).

identical interest in this case; and nothing in the USDA's defense of its own rule will involve a "range of considerations" at odds with appellants' interests.[8]

3. Relevant Interests Are Those Concerning the Subject Matter of *This* Litigation

As noted above, the relevant inquiry is whether, with respect to the "interest . . . that is the subject of the action," the would-be intervenor's interests are "adequately represented by existing parties." Arakaki, 324 F.3d at 1083 (emphasis added). Appellants nevertheless seek to create a divergence of interests by pointing to disagreements that are not "the subject of the action" in this litigation.

First, appellants point to litigation occurring "[b]efore this suit was filed," Br. at 25, which concerned USDA's permitting process for certain meat products, id. at 25-26. As is evident by their own description of events, appellants seek to rely on a different case that formed no basis for the district court's preliminary injunction here. Compare ER 1-14 (complaint in separate litigation), with ER 20-54 (complaint underlying the instant litigation). See also SER 3-5 (district court in this case discussing earlier, separate litigation). Whatever

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[8] It is difficult to understand why appellants (Br. at 24) believe their case to be analogous to Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1190 (9th Cir. 1998), which simply concludes without elaboration that an intervenor's interests were "more narrow and parochial" than the defendant's interests.

disagreement appellants might have had with USDA's position in that separate litigation, it has no bearing on whether USDA adequately represents appellants' interests with respect to "the subject of the action" in this case. Arakaki, 324 F.3d at 1083.

Likewise, appellants point to a portion of USDA's final rule whose implementation was delayed by the Secretary. Br. at 26. Because that prior aspect of the final rule was delayed, it was not any part of the rule enjoined by the district court. To the contrary, the district court specifically noted that the validity of this prior portion of the final rule was not before it. See SER 15-16. Nor is this prior aspect of the final rule at issue in the cross-motions for summary judgment currently pending before the district court. Appellants may wish to defend a different version of the rule than the one ultimately adopted by USDA or reviewed by the district court, but that is not a basis for intervention.

This conclusion is a necessary corollary of the rule that a would-be intervenor cannot raise arguments or issues not raised by any of the existing parties. See, e.g., Arakaki, 324 F.3d at 1082-83 (affirming district court's denial of motion of intervenor who attempted "to assert additional claims . . . not raised by existing parties," holding that where a claim "is no longer the subject of Plaintiffs' action, intervention is inappropriate as a matter of right"); United States v. City of

Los Angeles, 288 F.3d at 399 ("[W]hen an existing party expressly and unequivocally disclaims the right to seek certain remedies, the court may consider the case as restructured rather than on the original pleadings in ruling on a motion to intervene."). A putative intervenor must take the litigation as he or she finds it. Appellants have no right to intervene to raise issues and claims that the existing litigants have not presented, or to challenge agency action that forms no part of the relevant litigation.[9]

Appellants also contend that it is "not difficult to foresee" future disagreements on a "wide range of matters." Br. at 26. That speculation cannot be the basis for intervention. To the extent that appellants posit differences in litigation strategy, it is established that such matters "normally justify intervention." Arakaki, 324 F.3d at 1086; see also California v. Tahoe Reg'l Planning Agency, 792 F.2d 775, 779 (9th Cir. 1986) (affirming denial of intervention where putative intervenor "did not have to prod any of the parties to become involved in the litigation," and the fact that "it would have argued its interests more vigorously than existing parties does not amount to a showing of inadequate representation of its interests"); Wright, Miller & Kane, 7C Federal Practice & Procedure § 1909 at

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[9] The same analysis applies to appellants' suggestion (Br. at 26) that USDA's final rule violates NAFTA - a suggestion that they have "elected" not to raise. Ibid.

344 (2d ed. 1986) ("A mere difference of opinion concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party.").

More important, however, there is no need to speculate on whether there will be "disagreements" on a "wide range of matters." Br. at 26. USDA has already clearly staked out its position and interest with respect to the relevant issues: it has already filed a memorandum of law in the district court opposing a preliminary injunction, a brief in this Court on the merits seeking to reverse the district court's judgment and vacate its injunction, and a memorandum of law in the district court supporting its cross-motion for summary judgment. In each, the USDA has explained its views at length. Appellants' speculation about differences of interests and conclusory statements that adequate representation is impossible fall far short of carrying their burden to show that USDA does not adequately represent their interests.

4. Information on Economic Impact Already Represented by USDA

Appellants argue that they "would offer * * * necessary elements to the proceeding that other parties would neglect," Arakaki, 324 F.3d at 1086, by providing an account of the economic affects of the final rule. See Br. at 27-28. But USDA is not "neglect[ing]" such interests. To the contrary, at every

stage of this litigation, USDA has emphasized the economic harm to various third parties resulting from an injunction of the final rule. See, e.g., Defs.' Opposition to Motion for Preliminary Injunction at 32 (Feb. 22, 2005); USDA Br. in No. 05-35214 at 16; USDA Opening Br. in No. 05-35264 at 59; USDA Reply Br. in No. 05-35264 at 28-29. Nor is intervention required to explain whether USDA "considered all the relevant factors or fully explicated" the bases for its actions. Br. at 29. The final rule's preamble, discussed extensively in USDA's district court and court of appeals filings, already does precisely that.

* * * *

In sum, appellants' interest in this litigation is already adequately represented by the government. Appellants, of course, can fairly and fully air all their arguments in a brief to the district court as amicus curiae, and the district court in fact granted leave to do so. There is no compelling reason why appellants must be entitled to the additional measure of intervention. Accordingly, the district court correctly denied intervention as of right.[10]

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[10] Nothing in the law would restrict the types of arguments appellants can make as amicus more than the types of arguments they could have made as intervenors. To the extent that appellants' motions for leave to file as amici sought only permission to advance a limited set of arguments, that restriction would be imposed by appellants themselves, and they can hardly be heard to complain of a self-imposed restriction.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION

The district court also correctly denied appellants' request for permissive intervention under Federal Rule of Civil Procedure 24(b).[11] An applicant is eligible for permissive intervention if "(1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998).[12] Even if these requirements are satisfied, a district court has discretion to deny permissive intervention, based on "whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the

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[11] Rule 24(b) provides, in relevant part:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[12] "While Rule 24 itself does not mention any jurisdictional requisite, that cannot end the inquiry as Rule 82 specifically provides that the Federal Rules of Civil Procedure 'shall not be construed to extend or limit the jurisdiction of the United States district courts.'" Blake v. Pallan, 554 F.2d 947, 956 (9th Cir. 1977). Accordingly, this Court adheres to the "prevailing view of the federal courts . . . that the claims of permissive Rule 24(b) intervenors must be supported by independent jurisdictional grounds." Id. at 955.

litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit," and other similar factors, Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977).

Here, the district court did not abuse its discretion in denying appellants' motion for permissive intervention. As noted above, appellants' interests are adequately represented by the government, and that reason alone is sufficient to deny intervention. See Tahoe Regional Planning Agency, 792 F.2d at 779. Moreover, this is an APA suit, and judicial review should be based solely on the administrative record before the agency. Accordingly, appellants have no significant contribution to make with respect to the full development of the issues in the case.

In addition, appellants' intervention would unnecessarily complicate the litigation. As the Court is aware, the rule at issue affects many entities which have submitted briefs as amicus curiae. Appellants have not identified any reason for concluding that it would be more appropriate to grant party status to them rather than to any others who are affected.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of appellants' motion to intervene.

Respectfully submitted,

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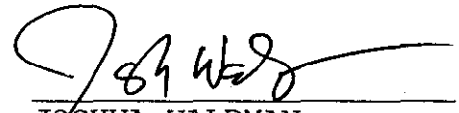
JUNE 2005

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(A) AND NINTH CIRCUIT RULE 32-1

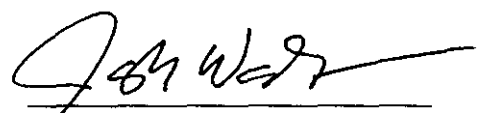
Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(A) and Ninth Circuit Rule 32-1, I certify that the attached Brief for Appellees is monospaced, has 10.5 or fewer characters per inch and is not subject to the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it is a principal brief of no more than 30 pages.



JOSHUA WALDMAN
Counsel for Defendants

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that there are two related cases in this Court, as discussed in the foregoing brief, namely, the Government's own appeal of the district court's preliminary injunction, currently docketed as No. 05-35264, and the National Meat Association's appeal of the district court's preliminary injunction and the denial of its motion to intervene, currently docketed as No. 05-35214.



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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2005, I caused two copies of the foregoing brief and one copy of the Supplemental Excerpts of Record to be served by Federal Express overnight delivery on the following counsel (U.S. mail delivery only where noted):

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I also hereby certify, pursuant to Fed. R. App. P. 25(d)(2) and 31(b), and pursuant to Ninth Circuit Rule 31-1, that on June 30, 2005, I caused to be filed an original and 15 copies of the foregoing brief and five copies of the Supplemental Excerpts of Record by Federal Express overnight delivery to:

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